

Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of

DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS FOR A NEW SUBSCRIPTION SERVICE

Docket No. 2005-5 CRB DTNSRA

WRITTEN DIRECT STATEMENT OF SOUNDEXCHANGE, INC.

Volume 2 of 6
Witness Statements and Exhibits

Donald B. Verrilli, Jr. (DC Bar 420434)
Thomas J. Perrelli (DC Bar 438929)
Mark D. Schneider (DC Bar 385989)
Michael B. DeSanctis (DC Bar 460961)
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(v) 202.639.6000
(f) 202.639-6066
dverrilli@jenner.com
tperrelli@jenner.com
mschneider@jenner.com
mdesantis@jenner.com

Counsel for SoundExchange, Inc.

October 30, 2006

Written Direct Statement of SoundExchange, Inc.
Volume 2 of 6: Witness Statements and Exhibits

1. Statement of James Griffin
2. Statement of Michael Pelcovits
3. Statement of Barrie Kessler

Exhibits to Statement of Barrie Kessler:

- SX Ex. 001 DP: Declaration of Barry M. Massarsky in Docket No. RM 2005-2 (Aug. 26, 2005)
- SX Ex. 002 DP: Motion by SoundExchange for Referral of Novel Material Question of Substantive Law Concerning the Preexisting Subscription Service Compulsory License in Docket No. 2006-1 CRB DSTRA (May 4, 2006)
- SX Ex. 101 DR: SoundExchange correspondence with DMX Music (RESTRICTED)
- SX Ex. 102 DR: SoundExchange correspondence with Sirius Satellite Radio Inc. (RESTRICTED)

ORIGINAL

RECEIVED

OCT 30 2006

Copyright Royalty Board

Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of

DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS FOR A NEW SUBSCRIPTION SERVICE

Docket No. 2005-5 CRB DTNSRA

TESTIMONY OF

JAMES GRIFFIN

Managing Director of OneHouse LLC

October 2006

**BEFORE THE
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C.**

In the Matter of)
)
)

Digital Performance Right In Sound)
Recordings and Ephemeral Recordings)
For a New Subscription Service)
)
_____)

Docket No. 2005-5 CRB DTNSRA

Testimony of JAMES GRIFFIN

I. INTRODUCTION AND QUALIFICATIONS

I am Managing Director of OneHouse LLC, a media technology practice focused on bringing the gaps between media and technology companies.

I am a media technologist and have pursued this practice in various ways since the early 1980's, when my University of Pittsburgh and University of Kentucky communications studies ended with my taking a job in a highly-advanced electronic newsroom at a Knight-Ridder newspaper in Lexington, Kentucky, the Lexington Herald-Leader. Two and a half years later I became an International Representative for The Newspaper Guild in Washington, D.C., representing journalists and other media employees with regard to issues focused on new media and technology.

In 1992, I began working with Geffen Records as a consultant, and became its chief technology officer in 1993. While working for Geffen, my team released Aerosmith's *Head First*, a full-length on-line commercial song, recognized by the Smithsonian as an historic beginning. In 1996, Geffen's technology department was ranked by InfoWorld as among the world's best.

In 1998, along with Milt Okun's Cherry Lane Music Group, I started a company called Cherry Lane Digital, a consultant to Universal Studios, ABC/Disney, Microsoft, Nokia, Viacom, American Management Association, and many other companies, musicians and creative endeavors. Today that same company is called OneHouse LLC and is owned and run wholly by me.

In 1999, I testified before the Senate Judiciary Committee (which then included Senators Orrin Hatch and Patrick Leahy, among others) on file-sharing, along with seven witnesses, including Lars Ulrich of Metallica and Michael Robertson of MP3.com.

In 2001, I served as an expert witness in the webcasting Copyright Arbitration Royalty Proceeding, and I recently served in this role again during the 2006 Copyright Royalty Board's webcasting rate hearing.

I regularly lecture on media technology in academic environments including the Royal Society for the Arts in London, where I was recently invited to become a Fellow of the Society. I delivered numerous talks and performed extensive work for the Nokia Research Center in Helsinki, and I twice lectured before the prestigious Aula group in Finland. I served for two years (1997, 1998) as technologist-in-residence for the Marketplace studies program at the Harvard Business School. I have lectured at numerous business and law schools, including Northwestern, the University of Illinois, UCLA, the University of California-Berkeley, the University of Texas, George Washington University, Georgetown University and the University of Southern California.

I am a member of the National Academy of Recording Arts & Sciences, and serve on the advisory boards of numerous community groups, including the Electronic Frontier Foundation and the Future of Music Coalition.

II. OVERVIEW OF TESTIMONY

Satellite music services provided over satellite television services are an important force in the music industry. The two satellite music services – XM and Sirius – provide music programming to America’s two satellite television services, Rupert Murdoch’s DirecTV and EchoStar’s DISH Network (“DISH”). The music programming at issue in this proceeding is listed in Appendix A.

Music channels are sometimes overlooked as incidental to the television subscription services they accompany, but they are important and valuable in three respects: First, music services delivered with satellite television programming are valuable to those who create the programming because the services promote XM’s and Sirius’s brands. Second, they are valuable to DirecTV and DISH Network because they help differentiate these services and are used (especially by DISH) to sell higher-tiered services. Third, the services are valuable to DirecTV and DISH subscribers, who receive choice in quality music programming without having to purchase music products like CDs and without having to use (or pay for) other music services. Yet while the services are growing in popularity and earning money for the companies that program and deliver the music, they are sapping money from the entities that produce the music — and that deserve a share of the growing rewards.

III. DISCUSSION

A. Background on Services

Terry Teachout, Commentary Magazine's music critic, described these services well for The New York Times in 2002:

... you will see a sky-blue screen identifying the song that is playing, the name of the performer and the title and label of the CD from which the track is drawn. The sound is as good as the speakers through which you're hearing it, and the channels cover an unusually wide range of genres: top-40 hits, golden oldies, rap and metal, country and classical, easy listening, jazz, gospel, New Age, even an all-Tejano channel. No disc jockeys are heard, nor are there announcements of any kind. All you hear is music, 24 hours a day.¹

Teachout found the systems to be of generally high quality, as do I in my general listening, which includes using the services at issue in this proceeding, as well as using XM's and Sirius's services over the Internet and through their own satellite broadcasts. The listening experience is free of the pops, clicks, and wavering sound of many disc, tape, or turntable motors. While these services can be played directly through the television's speakers, they are best appreciated when the television is connected through a home entertainment system providing a high quality audio experience.

Both XM and Sirius deliver the same programming provided to DISH and DirecTV through other paths: If you subscribe to XM or Sirius, you can hear them as webcasts via the Internet and as satellite broadcasts directly from the XM or Sirius satellite systems, for around \$13 per month, depending on payment system and options chosen. XM also offers an Internet-only version of its service for \$7.99 per month.

¹ Terry Teachout, The New York Times, Television/Radio: Turning Television Into a Music Box, March 10, 2002, <http://select.nytimes.com/search/restricted/article?res=F20910FE38540C738DDDA0894DA404482>.

Neither XM nor Sirius provides every channel of its programming through DirecTV or DISH, but the music offerings offer a substantial range of music.² The choice of music is far broader than that available on broadcast radio, and is more than enough to satisfy most listeners.

B. XM and Sirius Profit from Providing Programming to Satellite Television Services.

Both XM and Sirius profit from providing their music programming through television-oriented satellite networks.

They receive cash and other consideration for making these channels available to satellite television. But more important is the promotional effect of the service. Satellite radio service requires special receivers that customers must purchase, so XM and Sirius apparently find especially valuable other distribution methods that allow potential customers to listen to their services. Satellite television is no doubt an effective way for XM and Sirius to promote their satellite radio services.

C. Satellite Television Services Profit From Providing Music Programming.

XM and Sirius do not reap all the rewards of providing music channels to DirecTV and DISH Network. Each of these television providers uses these offerings to sell and upsell their current programming packages.

DirecTV and DISH are motivated primarily by the opportunity to differentiate their offerings from one another and from cable television (which also generally offers a

² See Appendix A.

host of music channels) and by the need not to be placed at a disadvantage by not offering music.

Additionally, these music channels are tiered, allowing DirecTV and DISH to push subscribers to purchase more expensive monthly packages to gain access to more music channel offerings. As Appendix A shows, different levels of subscription provide more and better music channels. If you want them all, you need to subscribe at the highest rates.

D. Satellite Services Benefit Consumers and Reduce Music Revenues.

Most of all, satellite music services benefit consumers, who can make their television part of a home entertainment system and enjoy near CD-quality sound along with the television programming they are purchasing. As a consequence, the music channels programmed by Sirius and XM, and delivered by DirecTV and DISH, inevitably substitute to some degree for CD and digital download sales, thereby reducing payments for musicians and other sound-recording rights holders at the current low rates.

With wide choice comes extraordinary option value for the subscriber. The television business knows the result will be fewer music sales, and they promote this in their advertising:

Why buy the CD when you've got digital music? Digital Cable includes **47 commercial-free music channels** 24 hours a day. Digital Cable is the latest in home-viewing entertainment technology offering more choices, clarity and control than ever before, and there's no equipment to buy! It's like having the ultimate CD collection at your fingertips.³

³ [Http://www.timewarnercable.com/austin/products/cable/music.html](http://www.timewarnercable.com/austin/products/cable/music.html).

It cannot credibly be argued that these services have a promotional effect in relation to record sales that outweighs the obvious substitution effect. Generally speaking, disc jockeys' testimonial endorsements for artists are a primary driver of broadcast radio's promotional effect. As Terry Teachout concluded for The New York Times, the satellite music services lack the well-known disc jockeys and other promotional characteristics that might result in at least some new music sales to counterbalance the services' substitution effects:

Much of the historic appeal of postwar American radio was rooted in the strongly individual tastes of well-known on-air personalities who decided what records they would play – and, just as important, what they would say about them. Can an announcerless cable channel possibly have the same career-enhancing effect on an unknown artist that Jonathan Schwartz had on the cabaret singer Nancy LaMott by playing her records, and talking about them with infectious enthusiasm, day after day on WQEW? I doubt it.⁴

There is only so much money in the customer's wallet, only so much time in the day, and only so many spaces in the home entertainment rack. It plainly is not a long-term positive value proposition for sound recording owners for customers to spend their money on satellite services, allocate their time to listening to satellite-provided music and replace their home hi-fi rack with specialized digital audio tuners.⁵

In sum, these television-based services are an example of the current trend in the music industry: music the service is overtaking music the product. There is, therefore, a

⁴ Terry Teachout, The New York Times, Television/Radio: Turning Television Into a Music Box, March 10, 2002, <http://select.nytimes.com/search/restricted/article?res F20910FE38540C738D DDAA0894DA404482>.

⁵ I am not relying on the fact that these services can be recorded, with some digital recorders and personal computers fully equipped and functional for this purpose.

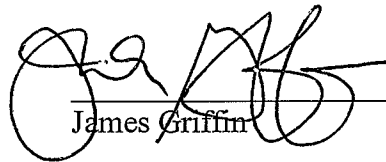
critical need for remuneration to replace the lost income represented by these music programming channels.

IV. CONCLUSION

Music programming today comes in many forms, via many paths, both wired and wireless. DirecTV and DISH are offering Sirius and XM in a fashion that replaces the customers' need to purchase music products or subscribe to multiple music services, while at the same time claiming some of the time, money and other resources that music fans would otherwise spend on CDs, digital downloads, and other forms of music.

These services are growing in popularity and earning money for the companies that program them and those that deliver them. Those who produce the music that drives this programming are entitled to share in the growing rewards that this new entertainment ecosystem fosters.

I declare under penalty of perjury that the foregoing testimony is true and correct to the best of my knowledge.



James Griffin

Date: 10/30/00

Appendix A

List of Satellite Music Channels by Network

DIRECTV Music

(All channels via XM satellite radio)

Channel	Total Choice	Plus
Air Musique	X	X
America	X	X
Audio Visions	X	X
BPM	X	X
Beyond Jazz	X	X
Bluegrass Junction	X	X
Bluesville	X	X
Bone Yard	-	X
Caliente	-	X
Chrome	X	X
Cinemagic	X	X
Deep Tracks	X	X
Ethel	X	X
Fine Tuning	-	X
Frank's Place	X	X
Fred	-	X
KISS	X	X
Lucy	X	X
MIX	X	X
Nashville!	X	X
On Broadway	-	X
RAW	X	X
Radio Disney	-	X
Real Jazz	X	X
Soul Street	X	X
Spirit	X	X
Squizz	X	X
Suite 62	X	X
Sunny	X	X
The 40s	X	X
The 50s	X	X
The 60s	X	X
The 70s	X	X
The 80s	X	X
The 90s	X	X
The Blend	X	X
The City	X	X

DISH Music

(Shaded channels are SIRIUS)

Channel	America's Top Family	60	120	180
'60s Vibrations	-	-	X	X
50's & 60's Hits	-	-	-	X
70's Hits	-	-	-	X
70's Songbook	-	-	X	X
7890- 4 Decades of Music	-	-	-	X
80's Hits	-	-	-	X
Acoustic Crossroads	-	-	X	X
Adult Alternative	-	-	X	X
Adult Contemporary	-	-	X	X
Adult Favorites	-	-	X	X
All that Jazz	-	-	-	X
Alt Nation	-	-	X	X
Area 33	-	-	X	X
BBC Radio 1	-	-	X	X
BYU Radio Network	-	-	X	X
Back Spin	-	-	X	X
Beach Party	-	-	-	X
Big '80s	-	-	X	X
Big Band Era	-	-	X	X
Bluegrass	-	-	X	X
Blues	-	-	X	X
Boombox	-	-	X	X
Broadway's Best	-	-	X	X
Buzzsaw	-	-	X	X
Classic Rewind	-	-	X	X
Classic Rock	-	-	X	X
Classic Soul	-	-	-	X
Classic Vinyl	-	-	X	X
Classical Ambience	-	-	X	X
Classical Voices	-	-	X	X
Contemporary Christian	-	-	X	X
Contemporary	-	-	-	-
Instrumentals	-	-	X	X
Contemporary Jazz	-	-	-	-
Flavors	-	-	X	X
Country Classics	-	-	X	X
Country Currents	-	-	X	X
Country Music One	-	-	-	X
Easy Instrumentals	-	-	X	X

The Groove	-	X	Elvis Radio	-	-	X	X
The Heart	X	X	Eurostyle	-	-	X	X
The Joint	X	X	Expressions	-	-	-	X
The Loft	X	X	Faction	-	-	X	X
The Message	X	X	Fiesta Mexicana	-	-	X	X
The Move	X	X	Hair Nation	-	-	X	X
The Rhyme	X	X	Hard Attack	-	-	X	X
The System	X	X	Hawaiian Music	-	-	X	X
The Village	-	X	Heart & Soul	-	-	X	X
Top 20 on 20	X	X	Hip-Hop Nation	-	-	X	X
Top Tracks	X	X	Hitline	-	-	-	X
U-Pop	-	X	Hot FM	-	-	-	X
Vox	X	X	Hot Hits	-	-	X	X
Watercolors	X	X	Hot Jamz	-	-	X	X
Willie's Place	X	X	Italia	-	-	-	X
X Country	X	X	Jam_On	-	-	X	X
XM Cafe	X	X	Jazz Cafe	-	-	X	X
XM Classics	X	X	Jazz Traditions	-	-	X	X
XM Pops	X	X	Jukebox Gold	-	-	X	X
XMU	-	X	KidTunes	X	-	X	X
			Latin Styles	-	-	X	X
			Left of Center	-	-	X	X
			Light Classical	-	-	X	X
			Love Songs	-	-	-	X
			Mexicana	-	-	X	X
			Modern Rock Alternative	-	-	X	X
			Moodscapes	-	-	-	X
			Movin' Easy	-	-	X	X
			New Age	-	-	X	X
			New Country	-	-	X	X
			New Orleans Jazz	-	-	-	X
			NuJazz	-	-	X	X
			Octane	-	-	X	X
			Outlaw Country	-	-	X	X
			Piano & Guitar	-	-	-	X
			Planet Jazz	-	-	X	X
			Power Rock	-	-	X	X
			Praise	-	-	X	X
			Prime Country	-	-	X	X
			Pure Jazz	-	-	X	X
			Reggae	-	-	X	X
			Roadhouse	-	-	-	X
			Rolling Stones Radio	-	-	X	X
			Rumbon	-	-	X	X
			SIRIUS Blues	-	-	X	X
			SIRIUS Disorder	-	-	X	X
			SIRIUS Gold	-	-	X	X
			SIRIUS Hits 1	-	-	X	X
			SIRIUS Love	-	-	X	X
			SIRIUS Pops	-	-	X	X

Soul Town	-	-	X	X
Spa 73	-	-	X	X
Standard Time	-	-	X	X
Super Shuffle	-	-	X	X
Symphony Hall	-	-	X	X
The Bridge	-	-	X	X
The Coffee House	-	-	X	X
The Pulse	-	-	X	X
The Roadhouse	-	-	X	X
The Spectrum	-	-	X	X
The Strobe	-	-	X	X
The Vault	-	-	X	X
Totally '70s	-	-	X	X
Tropical Breezes	-	-	-	X
Underground Garage	-	-	X	X
Universo Latino	-	-	X	X
Urban Adult	-	-	-	X
Urban Beat	-	-	X	X

Information derived from DISH Network vs. DirecTV, September 18, 2006¹

¹ [Http://www.dishordirect.com/sat/basic_audio.php](http://www.dishordirect.com/sat/basic_audio.php).